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May 16, 1996

DOCKET FILE COPY ORIGINAL

Office of the Secretary
Federal Communications Commission
1919 M Street N.W., Room 222
Washington, D.C. 20554

RE: CC Docket No. 96-98

Dear Secretary:

Enclosed please find the original and sixteen (16) copies of **Comments of the National Association of State Utility Consumer Advocates (NASUCA)** in the above-referenced docket. Please stamp the extra copy "filed" and return it in the enclosed self-addressed and prepaid envelope.

Thank you for your assistance in this matter.

Sincerely,

Martha S. Hogerty
Missouri Public Counsel

MSH/bjr

Enclosures

cc: Janice Myles, Common Carrier Bureau
International Transcription Services, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

RECEIVED

MAY 1 6 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter Of:	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE
UTILITY CONSUMER ADVOCATES
(NASUCA)

By their counsel:

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DATED: May 16, 1996

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SUMMARY

NASUCA contends that the FCC should not preempt state authority and assign all loop costs to local exchange service. NASUCA rejects the underlying assumption contained in the Notice of Proposed Rulemaking that the "cost" of local exchange service is equal to 100% of the loop and port element and the suggestion that the Commission should require the states to set local rates based on "cost."

The FCC may not lawfully set local rates because Congress has specifically prohibited the FCC from exercising authority to set local rates. 47 U.S.C. §152(b). Moreover, numerous jurisdictions have soundly rejected the view that the loop is an exclusive cost of local service and have accepted the proposition that the loop is a joint and common cost that provides a shared benefit to all subscribers. Accordingly, it is appropriate that the cost associated with the loop facility be recovered from all services that use it. This view has now been codified in the Telecommunications Act of 1996. 47 U.S.C. § 254(k).

Finally, current network configuration does not support the outdated paradigm that assumes the loop is dedicated to a single customer. As the network evolves, the notion of a customer specific loop becomes increasingly antiquated.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE
UTILITY CONSUMER ADVOCATES
(NASUCA)

I. INTRODUCTION.

On April 19, 1996, the Federal Communications Commission (FCC or Commission) released a Notice of Proposed Rulemaking (NPRM) soliciting comments with respect to the implementation of § 251, § 252, and § 253 of the Telecommunications Act of 1996. The National Association of State Utility Consumer Advocates (NASUCA) submits these comments. NASUCA is a national association of 41 offices in 38 states and the District of Columbia authorized by state law to represent utility consumers

NASUCA is concerned with much of the discussion contained within the NPRM involving the assignment of all loop costs to local exchange service. Much of the discussion set forth in the NPRM presumes that local loop costs should be recovered entirely from local exchange service. Such cost shifting fails to recognize the shared nature of these costs, is inconsistent with judicial and state commission precedent, does not recognize changes in the network and competitive environment, would harm the effort to achieve universal service, and fails to comply with the safeguards set forth in 47 U.S.C. § 254(k).

II. REVIEW OF THE NPRM ON LOCAL EXCHANGE RATE ISSUES.

Much of the discussion within the NPRM concerns the level of interconnection rates. Specifically, the NPRM concerns what cost elements need be recovered through interconnection rates. That discussion then addresses the issue of whether the loop costs, and other joint and common costs,[1] should be recovered as a cost of interconnection for various unbundled elements or services, or should be shifted entirely to local exchange service.

The NPRM takes up the loop issue in many of its sections. NASUCA is most concerned with the discussion at II. PROVISIONS OF SECTION 251, B. Obligations Imposed by Section 251(c) on "Incumbent LECs", 3. Resale Obligations of Incumbent LECs, c. Pricing of Wholesale Services, (3) Relationship to Other Pricing Standards (II.. B., 3., c., (3)). In this section, the NPRM goes so far as to suggest that the FCC should establish pricing standards that would restrict how states could price local service. Notably, the NPRM indicates that the Illinois

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[1] In these comments, NASUCA will discuss local loop costs, and other related joint and common costs, under the shorthand phrase of the "loop" or "loop costs." NASUCA recognizes that in the narrowest definition the loop refers only to the pair of copper wires that provides interconnection between the subscriber and the wire center. However, as the FCC also points out, the loop can include feeder plant as well and NASUCA accepts that expanded definition. NPRM at ¶ 83 n.110. However, there are also a number of related facilities that are also closely related to the loop. For example, poles support the loop and conduit provides a physical structure through which the loop runs. NASUCA considers the poles and conduit as support facilities closely related to the loop. Thus, as used in this Comment, the term "loop" refers to the wires, cable, poles, conduit and other support structures that are closely related to the provisioning of the loop. NASUCA will also argue below that continuing to consider these issues in the context of the local copper loop does not properly anticipate changes in competitive markets and network architecture.

Commission has established an imputation rule and that such rule requires that "the sum of the rates for unbundled network elements be no greater than the retail service rate." NPRM at ¶ 184. The NPRM considers that, if retail rates are set too low and receive subsidies, then competitors will be less able to compete with such rates. Id. at ¶ 185. The NPRM then states:

> For example, assume the cost of basic residential local exchange service is $25, including a $20 cost for the loop element and a $5 cost for the "port" element, and the retail rate for such service (including the federal SLC) is $10. In such a case, application of the imputation rule would require either that the incumbent LEC offer unbundled network elements to its competitors at prices less than cost, or that the retail rate be increased to at least $25.

Id.

The assumption implicit in this discussion is that the cost of local exchange service is equal to 100% of the entire loop and port element. The NPRM then goes on to propose that states may "restructure retail rates to eliminate non-competitively neutral, implicit subsidy flows." Id. at ¶ 187. Most disturbing is the recitation in the NPRM of one proposal that the FCC should consider entering a preemption order requiring that rates for local service must be set in a particular manner, e.g. must exceed cost. Id. at ¶ 188.

However, the NPRM also discusses the possibility that such imputation is not appropriate. The NPRM notes that, even if a retail service is sold below "cost," those costs will be recovered through other services. Id. at ¶ 186. The NPRM explains that:

> Under these circumstances, it could be argued that no imputation rule is needed to protect new entrants because, as a matter of market economics or legal obligations, new entrants purchasing unbundled elements priced at cost would be providing all of these services, and thus could collect the same relatively overpriced revenues for toll service, interstate access, vertical features, and

> other offerings to make up for the underpricing of basic residential local exchange service.

Id. The NPRM recognizes that "unbundled elements could be used to provide services that compete with LEC retail services that are the source of the subsidy." Id. (Emphasis added). In this respect, the NPRM seems to recognize that there is a distinction between a service, such as local exchange, and an unbundled network element, such as the loop, and that the two are not necessarily the same.

Discussions of similar topics also take place in other portions of the NPRM and these discussions relate to the above pricing assumptions. For example, the NPRM recognizes that § 2(b) of the 1934 Act continues to prohibit the FCC from asserting any jurisdiction over intrastate wire communications. NPRM at ¶ 39. The NPRM offers that § 251 applies to certain intrastate "charges" in connection with intrastate service. Id. But finally, the NPRM seems to restrict the FCC's jurisdictional authority by stating:

> We note that Sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions. For example, rates charged to end users for local exchange service, which have traditionally been subject to state authority, continue to be subject to state authority.

Id. at ¶ 40.

The NPRM further discusses the loop issue in other contexts. For example, the NPRM notes that local switching equipment, "[u]nlike a local loop" is "often shared by thousands of customers." Id. at ¶ 99. This suggests that the loop is not a shared cost. Further, the NPRM notes that the Universal Service rulemaking is now considering "how the existing subsidy to reduce the level of the SLC should be changed." Id. at ¶ 141. While the FCC's unstated assumptions concerning the nature of loop costs are extremely unclear in these sections, that the NPRM appears to assume that loop costs are exclusively a cost of local exchange service and that, if local exchange service does not recover all loop costs, the service is subsidized. This also suggests that other services should make no contribution toward the costs of the loop.

On the other hand, NASUCA agrees with other remarks made in the NPRM concerning the nature of and proper recovery of "shared" costs. For example, the NPRM notes that a dedicated facility is a facility that is only used by a single party while shared facilities are used by multiple parties. Id. at ¶ 150. Further, users that share the use of that facility should pay for its cost. Id. at ¶ 151. The NPRM also requests parties to offer definitions of shared, joint and common costs without offering any tentative conclusions as to whether local loop costs are not in those categories. Id. at ¶ 126.

III. NASUCA OPPOSES THE FORCED PRICING OF LOCAL EXCHANGE SERVICE BASED UPON A 100% LOOP ASSIGNMENT.

A. The FCC Has No Such Legal Authority.

NASUCA opposes any FCC ruling that would remove authority from state commissions to set local exchange rates. In NPRM ¶ 188, the Commission requested comments on whether the Commission should commence a proceeding to determine whether it is appropriate to enter a preemption order requiring local service rates to exceed the cost of providing local service. NASUCA unequivocally opposes such a proceeding because, inter alia, local ratemaking is exclusively the states' jurisdiction. This principle is well established in federal telecommunications law

The FCC at NPRM ¶ 40 recognizes this long standing principle that local service ratemaking is outside of its jurisdiction. At ¶ 40, the Commission said:

> "We note that Sections 251 and 252 [of the Telecommunications Act of 1996] do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions. For example, rates charged to end-users for local exchange service, which have traditionally have subject to state authority, continue to be subject to state authority."

Thus, the discussion of local rate preemption in ¶ 188 is at odds with the legal conclusion set forth in ¶ 40.

In like manner, the Commission's additional request in ¶ 188 for comments on issuing interim rules relating to local service rates pending the Joint Board's review of Universal Service requirements is beyond the Commission's jurisdiction. Such interim rules should not be issued.

Section 152(b) of the Telecommunications Act of 1934 remains in full force and effect and continues to deny the FCC any power to set rates for local service. Section 152(b) provides:

> Except as provided in Sections 223 through 227 of this title, inclusive, and Section 332 of this title, and subject to the provisions of Section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. (Emphasis added).

The Telecommunications Act of 1996 did not abolish the prohibition in § 152(b) on local rate making authority. The States and their commissions still have exclusive, original and primary jurisdiction for local rates for local service.

The Supreme Court considered the § 152(b) bar to FCC local service rate making in *Louisiana Public Service Commission* v. *Federal Communications Commission*, 476 US 355

(1986). The FCC issued rules relating to the depreciation practices of inside wiring for telecommunications. Several state regulatory commissions challenged the FCC's authority to issue the rules as the depreciation rules affected the states' local ratemaking authority. The Court agreed with the states that the FCC has limited power under § 151 of the Telecommunications Act of 1934 and under the supremacy clause of the U.S. Constitution. (Art. VI, cl. 2).

In the *Louisiana* case, the FCC claimed jurisdiction stemming from § 151 of the Act, which, in broad terms, directed the FCC to develop a rapid and efficient national telephone network. The FCC agreed that it was entitled to preempt state regulations that frustrated federal policy. In that context, the FCC argued that state regulators must not be permitted to jeopardize the continued viability of the telecommunications industry by refusing to allow carriers to depreciate plant in a manner to allow for timely and accurate recapture of capital. The FCC claimed it had jurisdiction to preempt state rules that stand as an obstacle to the accomplishment and execution of Congress' full purpose and objectives

The Court held that the FCC may preempt state law "only when and if it is acting within the scope of its congressionally delegated authority." Id. At 374. Until Congress confers power on it, the FCC has no power to preempt the laws or regulations of a sovereign state. Section152(b) is not a delegation of authority, but rather is an explicit congressional denial of power to the FCC for intrastate ratemaking purposes The Court held:

> "...the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional denial of power to the FCC to require state commissions to follow FCC

> depreciation practices for intrastate ratemaking purposes." Id. at 374. (Court's emphasis)

The Court rejected any argument that the FCC may nevertheless take action that it thinks will best effectuate a federal policy. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." Id. at 374-375.

The Court held that § 152(b) not only contains a substantive jurisdictional limitation on the FCC over rates for intrastate communications services, but also contains a rule of statutory construction which directs that "nothing in this chapter shall be construed to apply to give the Commission jurisdiction with respect to... intrastate communication service...." Id. at 373. Accordingly, the Commission may not lawfully enter a preemption order prescribing cost standards for local service and, similarly, may not lawfully issue interim rules on the local rate issue.

B. The Loop Must Not Be Considered An Exclusive Cost of Local Exchange Service.

NASUCA wishes to make it absolutely clear that the loop cannot be considered as a cost that is exclusively related to local exchange service. The loop represents the "common line" that is used by many services to supply interconnection between subscribers. In this manner, it is not a facility or cost that should be exclusively assigned to any one service. Rather, it is a joint and common or shared cost that should be recovered from many services.

The question of how joint and common costs, particularly loop costs, should be recovered has been an issue for many years and has been considered by the courts and state commissions. The important early case was Smith v. Illinois, 282 U.S. 133 (1930)(Smith). In Smith, the Illinois Commerce Commission had ordered AT&T to reduce some of its rates. Smith at 142. The federal district court had enjoined the Commission from enforcing its order. Id. However, the Supreme Court set aside the lower court order because neither the Illinois commission nor the court had separated the interstate and intrastate rate base. Id. at 148. A large part of the problem came down to the allocation of the loop to local exchange service.

The federal district court, in overturning the Illinois Commission order, did not attempt to separate the interstate and intrastate rate base. Id. at 146-47. Instead, all of the loop or "exchange property" was "attributed to intrastate service by the district court." Id. at 150. The Supreme Court rejected this view.

The Supreme Court held as follows:

> The appellants insist that this method [i.e. allocating all of loop costs to exchange service,] is erroneous, and they point to the indisputable fact that the subscriber's station, and the other facilities of the Illinois Company which are used in connecting with the long distance toll board, are employed in the interstate transmission and reception of messages. While the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential [citations omitted], it is quite another matter to ignore altogether the actual use to which the property is put. It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden--to what extent is a matter of controversy.

Id. at 150-51 (Emphasis added). Thus, the Supreme Court held that the loop could not be considered as 100% assignable to local exchange service but was a shared cost of intrastate and interstate services.

This point was also emphasized in a recent decision of the Washington Utilities and Transportation Commission in Washington Utilities and Transportation Commission v. US West Communications, Inc., Docket No. UT-950200, April 11, 1996 (US West). In that discussion, the Washington Commission stated:

> The Commission finds, consistent with the presentations of Public Counsel/AARP, and other parties that the cost of the local loop is not appropriately included in the incremental cost of local exchange service. The local loop facilities are required for nearly every service provided by the Company to a customer. Neither local service nor in-state long distance service nor interstate long distance nor vertical features can reach a customer without the local loop. Should USWC cease to provide any one of these services, its need for a local loop to provide the remaining services would remain. The cost of the local loop, therefore, is not incremental to any one service. It is a shared cost that should be recovered in the rates, but no one service is responsible for that recovery. USWC's presentation that the local loop is appropriately and necessarily an element of the cost of local exchange service, made through the testimony of witness Farrow, is not credible in light of the purposes of a long run incremental cost study and is inconsistent with accepted economic theory regarding such studies.
>
> USWC argues that allocation of any loop costs to access and toll service violates the principle of incremental costing, because the entire loop cost would exist even if no carrier access or toll services were provided. This argument addresses why loop costs should not be included in the incremental cost of toll and access, but it does not explain why they belong in the incremental cost of local service. The argument applies equally well in application of the costs to local exchange service. Indeed USWC's brief supports the principle that the loop is a shared cost rather than the direct cost of any one service:
>
>> All multi-service firms have shared and common costs by definition, but they are particularly significant for a LEC, which offers very capital and expense intensive local service which require a

> separate loop from the central office to every premise in its service territory. (USWC brief, 11).

> Our conclusion that the loop is correctly treated as a shared cost is consistent with the testimony of USWC's cost witness Brian Farrow, who testified:
>
> > USWEST recommends that the Commission deal with the recovery of loop costs as a pricing exercise. The loop costs calculated in USWESTs' cost studies calculate the loop costs as though the loop is the cost object. The recovery of those costs is a pricing exercise. (Ex. T-338, p. 14).

US West Order at 83-84 (Emphasis added). The Washington Commission then consistently determined that local exchange service was not cross-subsidized and explained this point as follows:

> The most important question to be answered by cost studies in this case is whether residential local exchange service is being cross-subsidized by business and toll service. USWC argues that this cross-subsidy exists and is undermining its ability to remain competitive. Other parties, including Staff, Public Counsel, TRACER, MCI, and AT&T, argue that the residential local service rate covers its incremental cost.
>
> The evidence clearly shows that residential service is covering its cost. The incremental cost of local service is approximately $4.42. This amount is calculated by subtracting the Hatfield model results for loop cost ($8.96 [Ex. 765-T, 4]) from the Hatfield model results for the total cost of local service ($13.38 [Ex. 767]), using the modified fill factors. These values are only approximate, in part because any model result is only approximate and in part because the Hatfield model results do not necessarily reflect the input value determined earlier to be appropriate.
>
> The conclusion to be drawn from these cost results is that residential service does not receive a subsidy at current rates. The average residential customer today pays $10.50 for local service and EAS adders, plus a subscriber line charge of $3.50. If USWC

> were to exit the local residential exchange market, its revenues would decrease by $14.00 per customer, and its costs would decrease by about $4.42 per customer. Not only does residential service cover its incremental cost (the test for cross-subsidy), it even covers the incremental cost of the local loop that is used to provide local, long-distance, and vertical services, since the revenue from local service, including the subscriber line charge, exceeds the $13.38 cost of local service plus the local loop.

US West Order at 89-90.

Other state commissions have come to similar conclusions. The Pennsylvania PUC (Public Utilities Commission) has also addressed the issue of whether loop costs are joint and common costs and explains as follows:

> We agree with Bell [Atlantic-Pennsylvania, Inc.], GTE and the PTA [Pennsylvania Telephone Association] that a portion of all joint, shared and common costs, including overhead costs, should be reasonably assigned to basic universal service. Such assignment is appropriate regardless of whether one considers the assignment to be an add-on to the TS-LRIC of basic universal service. Without such allocation, cost studies will not reflect a LEC's total cost in providing basic universal service.
>
> We agree with PTA and OCA [Office of Consumer Advocate] that local loop costs are joint or shared costs since the local loop is jointly utilized to provide a wide array of telecommunications services, among which are basic universal services. Our view is unaffected by whether one views basic universal service as a single service or a group of services. Regardless, we believe an appropriate portion of local loop costs should be assigned to basic universal service, consistent with the treatment of other joint, shared or common costs.

Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications Services in the Commonwealth, Docket No. L-00940035, Order of September 5, 1995 at 12 (Emphasis added).

In the Breezewood Telephone Company ("BTC") rate case, Pa. PUC v. Breezewood Telephone Company, 74 Pa. PUC 431 (1991), the Pennsylvania PUC also considered this issue in the context of AT&T's contention that the Carrier Common Line Cost ("CCLC") did not represent a cost which BTC incurred to provide access and that these dial tone line costs could be largely recovered through BTC's local exchange and toll rates but not through its access charges. Id. at 489-90. The state consumer advocate in the Breezewood case explained this point and

> asserted that NTS access line costs are joint costs of providing local, toll, access, and other services (OCA St. 1, p. 41). Dr. Johnson argued that IXCs such as AT&T must make use of the local loops that give rise to NTS costs in providing toll service to local customers, and that it is proper for the IXCs to contribute to these joint NTS costs through the CCLC (*Id.* at 42).

Id. at 490. In response, the PUC ruled upon these issues as follows:

> We want to state that we consider the costs associated with the loop from the central office to the customers premises a non-traffic sensitive joint cost. We further state that the reductions in CCLC are steps in the right direction
>
> AT&T states that the Recommended Decision is not clear on whether NTS costs are joint costs of providing local and toll services. It asserts that our Final Order should declare that dial-tone line costs are not "joint costs" of various services, but instead are the costs of establishing the physical connection between each customer's premises and the Company's central office.
>
> There is no dispute that both the local customer and AT&T make use of the same local network to complete both local and interLATA calls. If it were not for the existence of the local network, AT&T would be required to construct at considerable expense an alternative means of access to the local customer. We find that CCLC is the cost of compensating BTC for the use of the

common line, and as such, CCLC clearly pays for a service received by AT&T. Thus, dial tone line costs are joint costs.

Id. at 494 (Emphasis added).

Also, the Colorado Public Utilities Commission in its cost allocation regulations discussed the manner by which rates should be set in view of cost studies performed for any service. 4 CCR 723-30, Rule 4(2)(a)(iii). These Colorado regulations, as promulgated by the Colorado Commission and made effective July 30, 1993, state as follows:

> As an example, consider the access loop. The access loop is not a separate service but rather is an input necessary for the provision of many telecommunications services. As such, costs associated with the access loop will not appear in the total service long run incremental cost of any single service requiring the access loop but will appear as part of the total service long run incremental cost of the entire group of services requiring the loop. Consequently, prices must be set so that the sum of the revenues from all services requiring the access loop covers not only the sum of the total service long run incremental costs for the individual services but also the shared cost of the loop.

Id. The Colorado Public Utilities Commission in another order has also rejected allocating 100% of all loop costs to local exchange through pricing decisions and pointed out the unfairness of such a proposal, as follows:

> Although touted as a forward-looking and accurate cost method, the Commission finds that LRIC costing is fraught with a number of difficulties. LRIC costing leaves the indirect (that is, joint and common) costs still to be collected from some source. If competitive products and services are priced at the margin, we agree with Staff that the basic exchange (which is a basically inelastic market) becomes a sump into which all the joint and common costs are thrown. In other words, competitive services (priced at the margin) get the advantage of a free ride in that the joint and common costs attributable to their production are not collected from the consumer of the competitive service or product,

> but rather from the consumers of those services and products, such as basic exchange, to which all the joint and common costs have been allocated. Since the basic exchange telephone ratepayers have nowhere else to go (that being the definition of an inelastic market), the joint and common costs are dumped on them.

Re Mountain State Telephone and Telegraph Company, I&S Docket No. 1720, Decision No. C87-364, 82 PUR4th 64, 84 (1987).

Similarly, the New Hampshire Public Utility Commission has stated as follows:

> The commission is well aware of the [New England Telephone's] claim that basic local exchange service has been and continues to be subsidized by toll. In the past, the notion of various services contributing to the support of basic exchange has been reinforced by cost studies that have served to demonstrate that the 'contribution' paid by customers of other services represents a disproportionately greater share of the company's incurred costs. These studies have served to mislead due to the company's decision to assign [dial tone] costs to local exchange services despite the fact that both interstate and state toll services are provided over local NTS facilities. Without local exchange facilities there would be no mechanism to connect interexchange services to the majority of customers premises. Since clearly the availability of the local network for toll use is a benefit to interexchange carriers and all toll customers, the commission believes that assignment of [dial tone] costs solely to local exchange services is unreasonable.

New England Telephone Generic Rate Structure Investigation, New Hampshire Public Utilities Commission, DR 89010, slip op., March 11, 1991 at 39-40 (Emphasis added).

In a case similar to Breezewood, the Florida Public Service Commission also ruled as follows:

> Upon consideration, we must reject the proposition that no NTS costs should be recovered from access charges. We agree with Quincy, Sprint, FACT and Public Counsel's arguments on this issue. Further, we believe that the IXCs, through their respective toll customers, benefit from the existence of the local network and that they should make a contribution towards its support.

> As we stated in Order No. 12265, in response to previous attempts to persuade us to accept the "no NTS" position, "The notion that an IXC should pay nothing for the subscriber loop because its use does not impose additional costs on the LEC is ill founded and contrary to common business practice, which is to charge customers for use of fixed cost facilities in the price for goods and services." It is appropriate that each service provide some contribution toward the fixed costs common to those services.

Re: Investigation into Nontraffic-Sensitive Cost Recovery, Docket No. 860984-TP, Order No. 18598, Fla.PSC, 89 PUR4th 258, 265-66 (1987).

The Louisiana Public Service Commission made a similar determination, as follows:

> While the argument [that the subscriber causes all loop costs to be incurred merely by subscribing] has superficial appeal, it ignores the fact that every time an *inter*exchange call is completed over the local loop to the end user, the *inter*exchange carrier is receiving the benefit of that plant The local loop is needed by the interexchange carrier to complete its calls. While it is true that it is impossible to precisely apportion the specific costs which should be born for that plant by the interexchange and local carrier, the fact remains that the interexchange carrier benefits from that plant and should pay for a portion of it.

Ex parte South Central Bell Telephone Company, Docket No. U-15955, Order No. U-15955, 83 PUR4th 1, 5 (1987).

The Missouri Public Service Commission at the time of divestiture also rejected proposals to implement a subscriber line charge on the theory that the loop is a shared cost and a subscriber line charge would merely be shifting toll costs to local service rates. In that Order, the Missouri Public Service Commission stated:

> The Commission, having considered the various arguments of the parties, is persuaded, and finds, that the cost of a local loop can arise from a demand for local and/or long-distance service. Therefore, local loop costs should properly be recovered through contributions from at least three services: local exchange, carrier access and toll. The local loop has no value to any customer, unless other customers are connected. The loop is in place to satisfy customers' demands for both long-distance and local service. This Commission finds and concludes that the local loop now gives a telephone subscriber access to an integrated telephone network which includes local exchange capabilities, and interstate and intrastate long distance (toll) capabilities as well. Since both local exchange service and toll service make use of the local loop, both services should contribute to the cost of the local loop.

Re: Southwestern Bell Telephone Company, Case Nos. TR-83-253 and TR-83-288, 26 MO.P.S.C. (N.S.) 344, 381 (1983).

These cases make very clear that the loop does not represent a cost that should be assigned 100% to local exchange service. The holding on this point is clear by the many state commissions that have considered this issue.

The FCC has also previously addressed the matter of allocating local loop costs on July 13, 1995 in In the Matter Of Amendment of Part 36 of The Commission's Rules and Establishment of a Joint Board, CC Docket No 80-286 (1995). The FCC proposed an allocation method in that rulemaking which would have allocated 25% of the loop to interstate toll, 25% to intrastate toll, and 50% to local service. Id. at 52 The FCC did not propose that 100% of loop costs should be applied to local service.

C. The Telecommunications Act of 1996 Prohibits Assigning 100% of Loop Costs to Local Exchange Service

Most recently, the Telecommunications Act of 1996,at § 254(k), prohibits the over assignment of loop costs to universal service:

> A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

47 U.S.C. § 254(k) (Emphasis added).

Congress has clearly stated that "no more than a reasonable share of the joint and common costs of facilities used to provide " universal service shall be borne by those services 47 U.S.C. § 254(k). Obviously, this "reasonable share" must be considerably less than 100% or there would be no real purpose served by this requirement of the 1996 Act.

It is also clear that the loop is a "joint and common" cost of universal service and fits into this definition. The standard reference work, Handbook of Industrial Organizations, Schmalensee and Willig, in an article entitled "Technological Determinants of Firm and Industry Structure" by Dr. John C Panzar, at page 17, defines a joint cost as one that "once acquired for use in producing one good . are costlessly available for use in the production of others." The loop qualifies under this definition as once a loop is available to produce one service it is "costlessly available" to produce others such as toll or optional services.

Moreover, the FCC has recognized the "joint and common" nature of the loop in various proceedings. Generally, the FCC has long referenced the loop as the "common line" through which all carriers are able to access the end user. In a recent case concerning a NYNEX request for waiver of FCC access charge regulations, In the Matter of the NYNEX Telephone Companies Petition for Waiver, 10 FCC Rcd. 7445, May 4, 1995, the Commission discussed the competitive conditions that NYNEX faced in the New York City area. In that discussion, the FCC referenced the joint and common nature of the loop as follows:

> In addition, we note that the NYPSC has permitted competition in the provision of all intrastate telecommunications services, including local exchange service, as well as switched access, special access, interLATA and intraLATA toll, and private line. That Commission has certified new competitive entrants as "LECs," and has given them rights comparable to those of incumbent LECs such as NYNEX. While our jurisdiction extends only to interstate telecommunications services, the joint and common character of the facilities providing exchange access and local exchange service means that the regulatory climate for interstate telecommuncations services affects the development of competition in the interstate access market

Id. at ¶ 39. Thus, there can be no question that the FCC has considered the local loop as a "joint and common" cost. Now that 47 U.S.C. § 254(k) limits the FCC's ability to shift those costs to services included in the definition of universal service, the FCC is not permitted to shift 100% of those costs to local exchange service.

This point is also made clear by the Congressional Joint Explanatory Statement of the Committee of Conference ("Committee Report") In the Committee Report, the related provisions originally contained in the Senate bill are explained. The Committee Report explains:

Subsection (h) of new § 253 prohibits telecommunications carriers from subsidizing competitive services with revenues from non-competitive services. The Commission and the States are required to establish any necessary cost allocation rules, accounting safeguards, and other guidelines to ensure that universal service bears no more than a reasonable share (and may bear less than a reasonable share) of the joint and common costs of facilities used to provide both competitive and noncompetitive services.[2]

Committee Report at 129 (Emphasis added). This legislative history makes it very clear that the intent was to limit the share of joint and common costs that universal service shall bear. The Committee Report even emphasizes that universal service may provide less than a reasonable share of such costs. Thus, Congress considered universal service to be so important that it acted to prohibit the states and the FCC from requiring universal service to bear more than a reasonable share of these costs and clearly determined that it could bear even less than a reasonable share.

D. Assuming That All of Loop Costs May Be Assigned to Individual Subscribers Is At Odds With the Assumptions Underlying Universal Service.

Considering the loop as a facility dedicated to a single subscriber is at odds with the fundamental tenets of the doctrine of universal service. The heart and soul of universal service is that there exists shared network externalities when a ubiquitous network is in place. All users of the network benefit when all are connected to and reachable by one ubiquitous network.

Thus, when the parent in Denver, Colorado can call the son or daughter living in Dinosaur, Colorado, both subscribers to the ubiquitous network receive an advantage by the

[2] The Senate bill originally had the universal service provisions at § 253. In the final draft of the legislation, the Conference Committee explained that the House receded to the Senate with minor modifications concerning the current § 254(k). Id. at 134. Thus, the Senate's view concerning cost allocation should be given great weight in interpreting this statute.

existence of the loops on both ends of that call. Moreover, the advantages of interconnectivity apply to business and governmental communications on such a network as well. In this respect, it is entirely inappropriate to consider a loop as the particular obligation of the subscriber on the end of that loop. Instead, the loop is a shared network element that connects all users and telecommunications providers with access to such a network.

E. The FCC Should Not Apply Outdated Assumptions To A More Competitive Environment As Network Architecture Changes.

A network model in which the loop is considered to be dedicated to the use of a particular customer does not accurately represent the current network. On the current network, the loop is not dedicated to a particular customer. Rather, with the use of digital line carrier, the greater portion of the loop is not customer specific. Thus, the FCC should avoid relying too heavily on the network paradigm of separate copper loops running from the switching center to the individual subscriber. Moreover, in a more competitive environment with greater bandwidth available such assumptions may become increasingly antiquated.

The single copper pair will likely be replaced by a network offering customers greater bandwidth close to their premises. In this respect, rather than all calls using a copper pair and voice grade circuits with a capacity of 128,000 bps, future networks will offer fiber optic or coaxial trunks between the customer and the switch and offer millions of bytes per second depending upon the customer's demand. Such a network may offer voice, video and data services depending upon the customer's requests. Program providers may also purchase authority for channel capacity for such facilities regardless of the voice circuit capacity necessary to serve the subscribers. In short, in a two way multi-media network environment any assumption that the